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REMARKS

ELECTION/RESTRICTION

Claims 21 and 22 have been cancelled as required by the Examiner.

CLAIM REJECTIONS – 35 U.S.C. §102

Claims 1-5, 8-13 and 16-18 have been rejected by the Examiner under 35 USC 102(b) as being clearly anticipated by EP 0,291,194 to May in light of Scientific Products Catalogue. In this rejection, the Examiner states that May teaches an assay device comprising a hollow casing constructed of moisture-impervious solid material containing a dry porous carrier which communicates directly or indirectly with the exterior of the casing such that a liquid test sample can be applied to a porous carrier, the device containing a labeled specific binding reagent for an analyte which labels specific binding reagent is freely mobile within the porous carrier when in the moist state, and unlabeled specific binding reagent for the same analyte which unlabeled reagent is permanently immobilized in the detection zone for the carrier material, referring to page 3.

The Examiner also states that the device contains a control zone loaded with an antibody that will bind to the labeled antibody from the first zone. The Examiner further states that May teaches backing the porous nitrocellulose sheet with plastic to increase handling strength and uses Schleicher & Schuell paper which is disclosed by the Scientific Products Catalogue reference as being pure white paper.

The Examiner acknowledges that May is silent on a “means for providing a complimentary color background”. However, May is still considered by the Examiner to anticipate the claims because (1) “complimentary” has not been properly defined, and (2) white is a color that can be seen as “complimentary color background”.

The Applicants respectfully traverse the Examiner’s rejection under 35 USC 102(b) as follows.

The Applicants submit that anticipation is established only when a single prior art referenced discloses, expressly or under principles of inherency, each and every element of the claimed invention. RCA Corp. v. Applied Digital Data Systems, Inc., 221 USPQ 385 (Fed. Cir. 1984); *In re Sun*, 31 USPQ 2d 1451 (CAFC 1993); Advanced Display Systems, Inc. v. Kent State University, 540 USPQ 2d 1673 (CAFC 2000).

Further, the Examiner must identify wherein each and every facet of the claimed invention is disclosed in the applied reference. Ex Parte Levy, 17 USPQ 2d 1461 (USPTO Board of Patents Appeals and Interferences 1990). In addition, the Applicants submit that anticipation must meet strict standards, and unless all of the same elements are found in exactly the same situation and united in the same way to form identical function in a single prior art reference, there is no anticipation. Tights, Inc. v. Acme-McCrary Corp., et al., 191 USPQ 305 (CAFC 1976).

Bearing in mind this criteria, it is clear that there is no teaching in the May reference of a “means for providing a complimentary color background for the color in site in order to increase visual perception of the color in site”.

The Examiner has stated that “complimentary” has not been properly defined. The Applicants take exception to this assertion. First, the term complimentary color is explicitly defined in the specification on page 6, at line 5 where it is stated “complimentary colors are those which appear generally opposite one another on a conventional color wheel which include the primary colors of yellow, blue and red.” In addition, the Applicants submit that the color wheel and complimentary color compliments is well known in the art and needs no further definition. As evidence, the Applicants submit herewith a website printout describing the color wheel and color compliments. As set forth in paragraph 3 of the attachment, color compliments are color opposites. This is harmonious with the Applicants definition of complimentary colors and accordingly the Applicants respectfully submit that the term “complimentary” has been properly defined.

In addition, the Examiner has stated that “white is a color that can be seen as ‘complimentary color background’”. The Applicants submit that white is not a color member of the color wheel as also evidenced by the attachment submitted herewith. Accordingly, the Examiner’s two reasons for concluding that May anticipates the claim are not supported.

Since May is totally silent with regard to a means for providing a complimentary color background for the colored site, there can be no anticipation. Thus, the Applicants respectfully request the Examiner to withdraw the rejection of claims 1-5, 8-13, and 16-18 under 35 USC 102(b) on the basis of the May reference.

The Examiner has also rejected claims 1, 2, 8, 9, 12, 13, 16 and 17 under 35 USC 102(b) as being clearly anticipated by U.S. 5,788,028 to Chandler. In this rejection, the Examiner states that Chandler discloses a chromatographic assay device for use with immunoassays with the device comprising (1) a first opposable component comprising a

sample preparation zone adapted to receive a sample to be assayed; and (2) a second opposable component comprising a chromatographic medium. The Examiner further states that the first and second opposable components can be brought into opposition so as to cause the sample preparation zone to apply the sample to be tested with the chromatographic medium and preferably the analyte is detected with a visually detectable label.

In traverse of this rejection, the Applicants repeat the criteria hereinabove set forth for a finding of anticipation under 35 U.S.C. §102(b).

The Chandler reference also fails to teach or suggest a means for providing a complimentary color background for the colored site in order to increase visual perception of the colored site.

With reference to column 34, beginning at line 40 of the Chandler reference, it appears clear that an inert dye of a contrasting color is provided so that the flow of the sample through the chromatographic medium can be visually monitored. This is not a teaching of the use of a complimentary color in order to increase visual perception of a colored site. In fact, Chandler reference teaches away from the present invention since after a sample has migrated a sufficient distance, for example, 2/3 or 3/4 of the length of the chromatographic medium, the first and second opposite components are brought into opposition and the absorber is brought into contact with the first applicator.

As stated at line 52 in column 34, "This reverses the flow of the sample through the chromatographic medium 346, allowing additional capture of the analyte at the detection zone 356." There is no teaching of using color dye at the detection zone in order to increase visual perception. Accordingly, since the Chandler reference is deficient in teaching the means for providing a complimentary color background for the colored site in order to increase visual perception of the colored site, there can be no anticipation under 35 USC 102(b). Accordingly, the Examiner is respectfully requested to withdraw the rejection of claims 1, 2, 8, 9, 12, 13, 16 and 17 under 35 USC 102(b) on the basis of the Chandler reference.

CLAIM REJECTIONS – 35 U.S.C. §103

The Examiner has also rejected claims 6, 7, 14, 16, 19 and 20 under 35 USC 103(a) as being unpatentable over May or Chandler in view of U.S. 4,303,409 to Ogawa, et al. In this rejection, the Examiner acknowledges that neither May nor Chandler provide test strips with specific colors and therefore reaches to Ogawa for disclosing a test strip for colorimetric

analysis of ascorbic acid in a liquid sample. Specifically, the Examiner states that Ogawa teaches a dye for adjusting background color such as food dyes of yellow No. 4 or blue No. 1 or an appropriate copper salt may be employed in the test strip for clarity and sensitivity of detection. The Examiner further acknowledges that all of the references including Ogawa do not specifically disclose a blue or red label for use with a yellow or green background and thereafter concludes that such a color scheme is not novel and is deemed to be in the purview of the manufacturer. The Examiner further states that a skilled artisan would have had a reasonable expectation of success in modifying the test paper taught by May and Chandler by incorporating the background color for added visual perception of the result as taught by Ogawa.

The Applicants submit that while Ogawa teaches the use of dyes for adjusting background color there is no suggestion or teaching of the use of different colored sites and backgrounds as taught by the present invention. Further, the Applicants do not understand the Examiner's reasoning. Specifically, the Examiner has stated that none of the references disclose a blue or red label for use with the yellow or green background and then concludes that such a color scheme is not novel. The Examiner has not presented any evidence that the color scheme utilized by the Applicants is not novel. That is, no references teach it and therefore on the basis of the references cited, it is novel.

The Examiner concludes that a skilled artisan would have had a reasonable expectation of success in modifying the test paper taught by May and Chandler by incorporating the background color for added visual perception of the result as taught by Ogawa.

Merely concluding that an invention would have been obvious does not discharge the Examiner "from the burden of providing the requisite factual basis and establishing the requisite motivation to support the conclusion of obviousness". Ex parte Stern, 13 USPQ 2d 1379 (BPAI 1989). "It is facts which must support the legal conclusion of obviousness" Ex parte Crissy, 201 USPQ 689 (PO Bd. App. 1978). The Examiner cannot resort to speculation to supply deficiencies and the factual basis, In re Warner, 154 USPQ 173 (CCPA 1967).

The Examiner has stated that the color scheme is deemed to be within the purview of the manufacturer, thus implying that the claim limitation is an obvious matter of choice. This however is not convincing in the absence of some reason why a person skilled in the art would find it obvious. In re Bezombes, Peyches and Tissier, 164 USPQ 387 (CCPA 1970).

The Applicants submit that the Examiner has provided no reason why such a color scheme is not novel.

The Examiner's statement that "a skilled artisan would have a reasonable expectation of success" indicates that the Examiner is applying an "obvious to try" test for obviousness. The Applicants submit that the attempted distinction of "reasonable expectation of success" is one of semantics, not of substance, and cannot be the basis for vitiating the well-established axiom that "obvious to try" is not the same as "obviousness" under Section 103 of the statute. Ex parte Old, et al., 229 USPQ 197, 200 (PTO Bd. Of Patent Appeals and Interferences 1985); In re Antonie, 195 USPQ 6 (CCPA 1977); Novo Industri A/S v. Travenol Laboratories, Inc., et al., 215 USPQ 412 (Court of Appeals 7th Circuit 1982). Ex parte Hillyer, 68 USPQ 2d 1222 (USPTO Board of Patent Appeals and Interferences 2003).

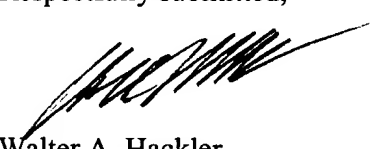
Accordingly, the Applicants submit that the Examiner has not made a prima facie case of obviousness and respectfully request the Examiner to withdraw the rejection of claims 6, 7, 14, 16, 19 and 20 under 35 USC 103(a) on the basis of May, Chandler and Ogawa.

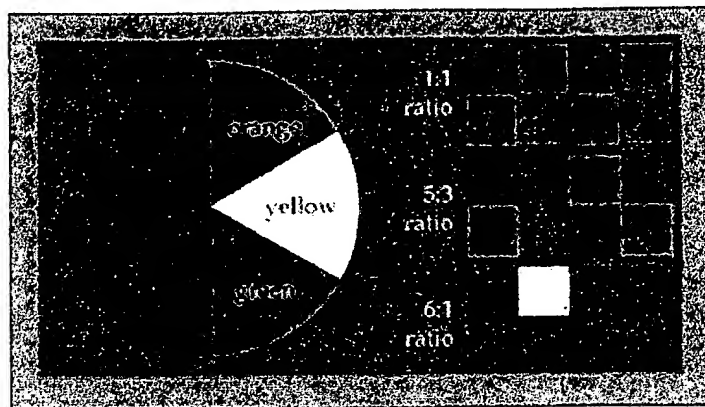
CONCLUSION

In view of the arguments hereinabove set forth and amendment to the claims, it is submitted that each of the claims now in the application define patentable subject matter not anticipated by the art of record and not obvious to one skilled in this field who is aware of the references of record. Reconsideration and allowance are respectively requested.

Respectfully submitted,

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ART STUDIO CHALKBOARD**Color Wheel and Color Complements**

The Color Wheel describes the relationships between colors. It is laid out so that any two **PRIMARY COLORS** (red, yellow, blue) are separated by the **SECONDARY COLORS** (orange, violet, and green).

Primary Colors are basic and cannot be mixed from other elements. They are to color what prime numbers are to mathematics. One can mix two primaries to get a Secondary Color. You will notice that each Secondary Color on the Color Wheel is bounded by two primaries. These are the components that one would mix to get that Secondary Color.

Color Complements are color opposites. These colors contrast each other in the most extreme way possible. They also help to make each other more active. In the Color Wheel illustration above, the complement of the color is used as text in that section. This is to illustrate the opposite character of the color. Color Complements are on opposite sides of the Color Wheel.

The ratios and illustrations on the right of the chalkboard are ideal amounts of color compliments according to Johannes Itten. He believed that equal amounts of red and green are appropriate (1:1 ratio). Blue and orange are different in value, so they their ratios need adjustment (5 blue:3 orange ratio). The same is true of violet and yellow (6 violet:1 yellow). These ratios were probably devised to counter the intensity of colors like yellow and orange.

Hint: All colors travel in waves within light. Color Complements have drastically different wavelengths and, consequently, cause some perception problems for a viewer if they are placed close to each other in a work of art. The cones and rods of the eye cannot handle so much information, so we sometimes detect a quivering or optical distortion when two complements are used near each other.